Supreme Court, U.S.
FILED
06-778 DEC 4 - 2006
OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

STEPHEN REMY MUELLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

HOWARD TRAPP

Howard Trapp Incorporated
200 Saylor Building
139 Chalan Santo Papa
Hagåtña, Guam 96910
(671) 477-7000

Counsel of Record for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Are the federal Sentencing Guideline limitations on the authority of district courts to impose sentences of probation with respect to offenses with statutory minimums still mandatory?

PARTIES TO PROCEEDING IN NINTH CIRCUIT

The parties to the proceeding in the Ninth Circuit are the petitioner, Stephen Remy Mueller, and the respondent, the United States of America.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDING IN NINTH CIRCUIT	ii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
STATUTES AND SENTENCING GUIDELINE INVOLVED	2
THE CASE	3
A. In the district court	3
B. In the Ninth Circuit	5
REASONS FOR GRANTING WRIT	7
I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT DIRECTLY CONFLICTS WITH A RELEVANT DECISION OF THIS COURT	7
A. The federal question	7
B. The Ninth Circuit has decided the federal question in a way that directly conflicts with a relevant decision of this Court	8
C. The federal question is important	10
D. The decision of the Ninth Circuit is otherwise erroneous	10
E. "Mandatory" minimum begs the question	10
F. A misapprehension	10
CONCLUSION	11
APPENDIX (Ninth Circuit opinion)	1a

TABLE OF AUTHORITIES

CASE Page

United States v. Booker, 543 U.S. 220 (2005).....8, 10, 11

STATUTES

18 U.S.C.:

§ 1466A(a)(1) 3
§ 2252A 2, 3, 4, 10
§ 3553(c)..... 5
§ 3561(a)..... 2, 5

28 U.S.C. § 1254(1)..... 2

OTHER AUTHORITY

U.S.S.G. § 5B1.1 3

IN THE

Supreme Court of the United States

No. ___

STEPHEN REMY MUELLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, Stephen Remy Mueller ("Mueller"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on September 8, 2006.

OPINIONS AND ORDERS BELOW

The opinion of the Ninth Circuit is reported at 463 F.3d 887 and is reprinted in the Appendix hereto. (P. 1a, *infra.*). No opinion was rendered by the district court. No order rendered by the district court is reported.

JURISDICTION

The judgment sought to be reviewed was entered on September 8, 2006. (P. 1a, *infra.*) The statutory provision believed to

confer on this Court jurisdiction to review the judgment in question on a writ of certiorari is 28 U.S.C. § 1254(1).

STATUTES AND SENTENCING GUIDELINE INVOLVED

18 U.S.C. § 2252A

(a) Any person who—

. . . .

(2) knowingly receives . . . —

(A) any child pornography that has been . . . transported in interstate or foreign commerce by any means, including by computer; . . .

. . . .

shall be punished as provided in subsection (b).

(b)(1) Whoever violates . . . paragraph . . . (2) . . . of subsection (a) shall be . . . imprisoned not less than 5 years and not more than 20 years . . . .

18 U.S.C. § 3561(a)

A defendant who has been found guilty of an offense may be sentenced to a term of probation unless–

(1) the offense is a Class A or Class B felony and the defendant is an individual;

(2) the offense is an offense for which probation has been expressly precluded; or

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

U.S.S.G. § 5B1.1

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of § 5C1.1 (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);

(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

THE CASE

A. In the district court.

Mueller is charged with receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and receiving obscene visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 1466A(a)(1). (Excerpts of R. 1-2.) To the charge of receiving child pornography, Mueller pleaded guilty. (Excerpts of R. 25.) The charge of receiving obscene visual depictions of minors engaging in sexually explicit conduct was dismissed. (Excerpts of R. 25.)

The statute which Mueller violated provides:

> (a) Any person who—
>
> . . . .
>
> (2) knowingly receives . . .—
>
> (A) any child pornography that has been . . . transported in interstate or foreign commerce by any means, including by computer; . . .
>
> . . . .
>
> shall be punished as provided in subsection (b).
>
> (b)(1) Whoever violates . . . paragraph . . . (2) . . . of subsection (a) shall be . . . imprisoned not less than 5 years and not more than 20 years . . . .

(18 U.S.C. § 2252A.)

Mueller argued that the appropriate sentence is probation:

> MR. TRAPP: This has been . . . probably the most frustrating case of my career because of . . . the Draconian nature of the penalty for what my client has admitted to having done.
>
> . . . .
>
> As to the recommendation that's being made by the probation officer, . . . it says: "The defendant's crime occurs at the expense of innocent children whose lives are destroyed at the hands of those perpetrating deprivation and sexual exploitation."
>
> If my client had paid one penny to somebody for having these images available to him, I would have to concede that that would be the case. All he has done is gone on his computer, discovered that these things were available to look at, looked at them, downloaded them. There is no evidence or suggestion that he ever subscribed to these sort of things, there is no evidence to suggest that he solicited them in the sense of asking anybody to actually send them to him. They were just there, and he looked at them.

(Excerpts of R. 8-9.)

The district court concurred (Excerpts of R. 10 ("I think I would concur with you")), but in spite of that, it ruled that the "statute makes this . . . a crime with a mandatory minimum of five years" (Excerpts of R. 17) and sentenced Mueller accordingly. (Excerpts of R. 17.)

18 U.S.C. § 3553(c) provides, "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence[.]" For the sentence of five years, the district court gave only one reason. The only reason the district court gave was that five years is "required by the statute of conviction." (Excerpts of R. 17.)

Mueller moved for release pending appeal. (Excerpts of R. 19.) The motion was denied. (Excerpts of R. 20.) In denying the motion, the district court stated:

> THE COURT: Mr. Trapp, I'm not going to authorize bail pending an appeal. If you wish to appeal, I suggest you file your appeal right away so that it can be heard within a reasonable time. Clearly, the reason why I'm doing this is because . . . if there was not a mandatory minimum, I would be giving him some time in any event, I would not be giving him probation without time. So he may as well start serving his time.

(Excerpts of R. 20-21.)

Mueller appealed "the otherwise final sentence." (Excerpts of R. 31.)

B. In the Ninth Circuit.

The issue presented for review was whether a defendant who is convicted of receiving child pornography may be sentenced to a term of probation. (Br. of Def.-Appellant 2.)

18 U.S.C. § 3561(a) provides:

> A defendant who has been found guilty of an offense may be sentenced to a term of probation unless–

> (1) the offense is a Class A or Class B felony and the defendant is an individual;
>
> (2) the offense is an offense for which probation has been expressly precluded; or
>
> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

Mueller argued that he may be sentenced to a term of probation thereunder:

> (1) The offense at bar is neither a Class A nor a Class B felony. It is not specifically classified by a letter grade in the section defining it, and the maximum term of imprisonment authorized is "not more than 20 years." (18 U.S.C. § 2252A(b)(1).) "An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is . . . less than twenty-five years but ten or more years, as a Class C felony[.]" (18 U.S.C. § 3559(a)(3).)
>
> (2) The offense at bar is not one for which probation has been expressly precluded. An example of an offense for which probation has been expressly precluded is 21 U.S.C. § 841(b)(1)(A): "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph." The section defining the offense at bar contains no such provision. At the most a preclusion is *implied.* "Implied" means "involved, suggested, or understood *without being openly or directly expressed.*" (*Webster's New World College Dictionary* 716 (4th ed. 1999)(emphasis added).)
>
> (3) Mueller was not scheduled to be sentenced at the same time for any other offense.

(Br. of Def.-Appellant 6-7(footnote omitted).)

Mueller also argued that a sentence of probation was no longer barred by the Sentencing Guidelines: "'[T]he guidelines do not authorize a sentence of probation.' (U.S.S.G. § 5B1.1, comment. (n.2).) This, however, is beside the point. The guidelines have become 'effectively advisory.' (*United States v. Booker*, 125 S.Ct. 738, 757 (2005).)" (Br. of Def.-Appellant 7-8.)

Finally, Mueller argued, "That the district court 'would be giving [Mueller] some time in any event, [that it] would not be giving him probation without time' (Excerpts of R. 20-21), is no obstacle to a sentence of probation: 'The court may provide, as further conditions of a sentence of probation, . . . that the defendant . . . (10) remain in the custody of the Bureau of Prisons during . . . intervals of time, totaling no more than . . . one year, during the first year of the term of probation.' (18 U.S.C. § 3563(b).)" (Br. of Def.-Appellant 8.)

The Ninth Circuit affirmed: "The district court was correct in interpreting § 2252(b) [sic] to require a mandatory minimum of five years incarceration, not to be substituted at the judge's discretion for an individually-tailored sentence that combines probation and a term of incarceration of less than five years." (P. 11a, *infra.*)

REASONS FOR GRANTING WRIT

I. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT DIRECTLY CONFLICTS WITH A RELEVANT DECISION OF THIS COURT.

A. The federal question.

Are the Sentencing Guideline limitations on the authority of district courts to impose sentences of probation with respect to offenses with statutory minimums still mandatory?

B. The Ninth Circuit has decided the federal question in a way that directly conflicts with a relevant decision of this Court.

The Ninth Circuit has decided the federal question in a way that directly conflicts with *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* this Court held that the Sentencing Guidelines are now advisory. (543 U.S. at 245.) In the case at bar the Ninth Circuit holds that the Sentencing Guideline limitations on the authority of district courts to impose sentences of probation with respect to offenses with statutory minimums are still mandatory:

> The question presented in this case is whether the district court is authorized to order probation under the probation statute, 18 U.S.C. § 3561, for a defendant convicted of receiving child pornography in violation of 18 U.S.C. § 2252 [sic], which provides for a mandatory minimum sentence of incarceration. Section 2252 [sic] establishes a mandatory minimum sentence of five years of incarceration but does not explicitly preclude probation. Probation is precluded for this conviction under the United States Sentencing Commission, *Guidelines Manual* ("U.S.S.G." or "Sentencing Guidelines"), and Mueller concedes that probation was not available as an alternative at the time of sentencing, when the district court was required to adhere to the Sentencing Guidelines. In the wake of *United States v. Booker*, 543 U.S. 220 (2005), however, the Sentencing Guidelines are no longer mandatory, and Defendant argues that nothing precludes the district court from imposing probation instead of the minimum mandatory sentence. We disagree. Because such an accidental byproduct of *Booker* would contradict clearly manifested congressional intent, we hold that probation is not available as an alternative and affirm the sentence imposed by the district court.
>
> . . . .

> Under the Sentencing Guidelines, probation is . . . precluded for offenses with mandatory minimums such as the one at issue here. *See* U.S.S.G. § 5B1.1. The Sentencing Guidelines provide that, subject to the restrictions in § 3561, a sentence of probation is authorized if the applicable guideline range is in Zone A or Zone B of the Sentencing Table. *Id.* § 5B1.1(a). Zone A deals with minimum terms of zero to six months, and Zone B deals with certain sentences having a term of up to twelve r onths. Accordingly, probation is precluded for offenses not within Zones A or B, subject to the restrictions of § 5B1.1.
>
> . . . .
>
> The sentencing regime we have now, after *Booker*, is a remedy created by the Supreme Court with the very purpose of giving effect to congressional intent embodied in the interrelated provisions of the complex sentencing structure. *See id.* at 248. Considering the potential remedial approaches, the Court explained, "we must decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute." *Id.* at 247. The Court's task in *Booker* is analogous to our task in this case. Here, our choice in these terms is whether to recognize an "express preclusion of probation" where such a preclusion is already implied and is expressly precluded by the now advisory Sentencing Guidelines, or to effectively eliminate the provision which provides for a mandatory minimum of five years of incarceration. Whereas the *Booker* Court gave effect to congressional intent by choosing the latter of the two approaches, we honor congressional intent in this context by choosing the former.

(Pp. 2a, 7a, 11a, *infra*.)

C. The federal question is important.

In consequence of *Booker*, the question presented for review will be implicated in countless determinations of sentence, in every federal district court.

D. The decision of the Ninth Circuit is otherwise erroneous.

The Ninth Circuit reasons:

> The Court's task in *Booker* is analogous to our task in this case. Here, our choice in these terms is whether to recognize an "express preclusion of probation" where such a preclusion is already implied and is expressly precluded by the now advisory Sentencing Guidelines, or to effectively eliminate the provision which provides for a mandatory minimum of five years of incarceration. Whereas the *Booker* Court gave effect to congressional intent by choosing the latter of the two approaches, we honor congressional intent in this context by choosing the former.

(P. 11a, *infra*.) This, however, is unsound. The Ninth Circuit has chosen to recognize, as an *express* preclusion of probation, a preclusion which is only *implied*, and which is precluded *expressly* by nothing more than a now *advisory* Sentencing Guideline.

E. "Mandatory" minimum begs the question.

The Ninth Circuit uses the phrase "mandatory minimum sentence." (App. *passim*.) The word "mandatory," however, appears nowhere in 18 U.S.C. § 2252A. The modification of "minimum" by "mandatory" does nothing more than beg the question: it assumes as proved the very thing the Ninth Circuit is trying to prove.

F. A misapprenhension.

A point of fact is misapprehended by the Ninth Circuit. The decision states that "Mueller concedes that probation was not available as an alternative at the time of sentencing, when

the district court was required to adhere to the Sentencing Guidelines." (P, 2a, *infra.*) At the time of sentencing, however, the district court was not required to adhere to the Sentencing Guidelines, and Mueller does not concede otherwise. This Court decided that the Sentencing Guidelines are "effectively advisory" on January 12, 2005. (*Booker*, 543 U.S. at 220, 245 (2005).) The date on which Mueller was sentenced was March 2, 2005. (Excerpts of R. 5.) And at sentencing the attorney for Mueller said that

> as far as I can tell, this would seem to be somewhat of a question of first impression. The government hasn't found any case to the contrary. And I think that one reason, it is a case of first impression because it's driven to a certain extent by the very recent case, that decision of *Booker* in the Supreme Court of the United States, this question probably wouldn't have come up before, didn't come up before, because it is mooted and trumped by the Sentencing Guidelines, which were mandatory but which are now expressly advisory, according to *Booker*.

(Excerpts of R. 8-9.)

CONCLUSION

The Ninth Circuit has decided an important federal question in a way that directly conflicts with a relevant decision of this Court. Because of this, this petition should be granted.

Respectfully submitted,

HOWARD TRAPP

Howard Trapp Incorporated
200 Saylor Building
139 Chalan Santo Papa
Hagåtña, Guam 96910
(671) 477-7000

December 4, 2006

Counsel of Record for Petitioner

APPENDIX

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 8, 2006]

No. 05-10180
D.C. No. CR-04-00044-RSL

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEPHEN REMY MUELLER,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Guam
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
November 22, 2005—Honolulu, Hawaii

OPINION

Before: Myron H. Bright,* M. Margaret McKeown, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Clifton

---

* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

COUNSEL

Howard Trapp (argued), Howard Trapp Incorporated, Hagåtna, Guam, for the defendant-appellant.

Leonardo M. Rapadas, United States Attorney, Districts of Guam and the NMI; Karen V. Johnson (argued), Assistant United States Attorney, Hagåtna, Guam, for the plaintiff-appellee.

OPINION

CLIFTON, Circuit Judge:

The question presented in this case is whether the district court is authorized to order probation under the probation statute, 18 U.S.C. § 3561, for a defendant convicted of receiving child pornography in violation of 18 U.S.C. § 2252, which provides for a mandatory minimum sentence of incarceration. Section 2252 establishes a mandatory minimum sentence of five years of incarceration but does not explicitly preclude probation. Probation is precluded for this conviction under the United States Sentencing Commission, *Guidelines Manual* ("U.S.S.G." or "Sentencing Guidelines"), and Mueller concedes that probation was not available as an alternative at the time of sentencing, when the district court was required to adhere to the Sentencing Guidelines. In the wake of *United States v. Booker*, 543 U.S. 220 (2005), however, the Sentencing Guidelines are no longer mandatory, and Defendant argues that nothing precludes the district court from imposing probation instead of the minimum mandatory sentence. We disagree. Because such an accidental byproduct of *Booker* would contradict clearly manifested congressional intent, we hold that probation is not available as an alternative and affirm the sentence imposed by the district court.

I. Background

Defendant Stephen Mueller pleaded guilty to the charge of receiving child pornography in violation of 18 U.S.C.

§ 2252(a).[1] That offense carries a mandatory minimum sentence of five years incarceration, as set forth in 18 U.S.C. § 2252(b).[2]

Before the district court, Mueller argued that the court had discretion, under 18 U.S.C. § 3561(a), to impose a sentence of probation notwithstanding the mandatory minimum, because § 2252 does not contain language expressly precluding that sentencing option. The district court interpreted the mandatory minimum language to preclude probation and to require incarceration for a term of at least five years, and sentenced Mueller to a term of five years, followed by three years of supervised release. Mueller timely appealed, asking us to reverse the sentence in order to give the court an opportunity to exercise its discretion to impose a sentence of probation instead.

II. Discussion

A. The probation statute

Despite the five-year mandatory minimum sentence required by § 2252(b), Mueller argues that the court may in-

---

[1] Section 2252(a) provides in relevant part: Any person who . . .

. . .

knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

. . .

the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct

. . .

shall be punished in accordance with subsection (b) of this section.

[2] Section 2252(b) provides in relevant part: "Whoever violates . . . subsection (a) . . . shall be fined under this title and imprisoned not less than 5 years and not more than 20 years . . ."

stead impose a sentence of probation under § 3561(a), which provides that:

> A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—
>
> (1) the offense is a Class A or Class B felony and the defendant is an individual;
>
> (2) the offense is an offense for which probation has been expressly precluded; or
>
> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

The way the probation statute is written does suggest, as Mueller argues, that in all other circumstances not listed, probation is available. The government acknowledges that the first and third limitations in the probation statute do not apply to Mueller or his offense: the offense is not a Class A or Class B felony, and Mueller was not necessarily going to be sentenced at the same time to a term of imprisonment. The harder question here is whether Mueller was convicted of "an offense for which probation has been expressly precluded." We conclude that the answer to that question is yes, and thus that Mueller is not eligible for a sentence of probation as an alternative to the five-year minimum term of imprisonment.

B. Preclusion of probation

Mueller's position finds some support in this court's interpretation of the predecessor to the current probation statute. We held that under 18 U.S.C. § 3651, the earlier probation statute (repealed 1987), a defendant convicted of violating a statute which provided for a mandatory minimum sentence could still be placed on probation, with his sentence suspended, or could be made eligible for immediate parole.[3]

---

[3] Section 3651 provided in relevant part:

United States v. Wilson, 506 F.2d 521, 522 (9th Cir. 1974). Similarly, in *Rodriguez v. United States*, 480 U.S. 522, 526 (1987), the Supreme Court held that the addition of language creating a "mandatory minimum" prison sentence did not repeal by implication the court's discretionary authority to suspend a sentence under § 3651, in the absence of more specific language precluding suspension of sentence or probation.

The current statute, § 3561(a), differs from its predecessor in that it does not give the sentencing court broad authority to "*suspend* the imposition or execution of sentence." 18 U.S.C. § 3651 (emphasis added). Under the new statutory scheme, instead of representing a suspension of the execution of a sentence, probation constitutes a type of sentence in and of itself. *See* 18 U.S.C. § 3561(a) ("A defendant who has been found guilty of an offense may be *sentenced* to a term of probation".) (emphasis added); *United States v. Granderson*, 511 U.S. 39, 43 n.3 (1994) ("The Sentencing Reform Act of 1984, for the first time, classified probation as a sentence."); S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182 3271 (Aug. 4, 1983) ("Proposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence"). This revision is significant because the status of probation as a suspension of sentence, rather than an independent sentence, was crucial to the Supreme Court's original holding that mandatory minimums did not bar probation under the old regime. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (finding no irreconcilable conflict between a minimum sentence and the "suspension authority" of section 3651).

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

The shift in probation's character from representing a suspension of sentence to being the actual sentence is also significant because the revised probation sentencing authority necessarily interrelates with the regime of the Sentencing Guidelines as a whole, to which the probation statute belongs. The current probation statute was enacted (and the former provision repealed) as part of a broad reform of federal sentencing that included establishment of the Sentencing Guidelines and the abolition of parole. *See* S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3272 n. 316 (Aug. 4, 1983) (explaining that, with regard to offenses for which the imposition of a sentence of probation is specifically precluded under subsection (a)(2), "[t]he Committee believes that for most offenses the Sentencing Guidelines will be better able to specify the circumstances under which an offender should be sentenced to a term of imprisonment and those under which he should be sentenced to a term of probation"). Thus, although like the prior version the current statute purports to create "no presumption for or against probation," S. Rep. No. 98-225, 1984 U.S.C.C.A.N. 3182, 3273, its reference to probation preclusion incorporates congressional intent regarding specific offenses, expressed elsewhere in the larger sentencing framework. Congress has precluded probation as an alternative sentence for this offense.

The current probation statute has never been the sole source of authority as to whether probation may be imposed. *See, e.g., United States v. Green*, 105 F.3d 1321, 1324 (9th Cir. 1997) (looking to both the offense statute itself and the Sentencing Guidelines to determine whether a sentence of probation was available, even where the offense statute contained express language precluding probation); *United States v. Mondello*, 927 F.2d 1463, 1468 (9th Cir. 1991) (rejecting the argument that by specifying only "certain serious crimes for which probation would be unavailable," Congress meant to permit probation for most of the unenumerated crimes, citing *United States v. Belgard*, 894 F.2d 1092, 1099 (9th Cir.

1990)); *see also United States v. Martinez-Cortez*, 924 F.2d 921, 923 (9th Cir. 1991) ("The legislative history of the Sentencing Reform Act . . . indicates that Congress did not intend 18 U.S.C. § 3561 to require that probation be available to all categories of defendants not stripped of that remedy by the section.") Class A and Class B felony offenses are specifically precluded under § 3561(a)(1), but they are not the only offenses for which probation is precluded.

Under the Sentencing Guidelines, probation is also precluded for offenses with mandatory minimums such as the one at issue here. *See* U.S.S.G. § 5B1.1. The Sentencing Guidelines provide that, subject to the restrictions in § 3561, a sentence of probation is authorized if the applicable guideline range is in Zone A or Zone B of the Sentencing Table. U.S. S.G. § 5B1.1(a). Zone A deals with minimum terms of zero to six months, and Zone B deals with certain sentences hav-ing a term of up to twelve months. Accordingly, probation is precluded for offenses not within Zones A or B, subject to the restrictions of § 5B1.1.

Congress has also precluded probation in the language of certain criminal offense statutes themselves. *See, e.g.*, 18 U.S.C. § 844(h) (imposing a mandatory minimum and adding "[n]otwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person" so convicted); 18 U.S.C. § 924(c)(1) (same); 21 U.S.C. § 841(b)(1)(A) (same).

Mueller points out that not every offense statute that carries a mandatory minimum contains accompanying language precluding probation. *See* 8 U.S.C. §1324(2)(B); 18 U.S.C. § 2252(b). This distinction does not, however, indicate that a probation alternative remains available for those offenses that do not contain such express preclusion language.

The legislative history of the offense statutes that preclude probation in the statute itself—*i.e.*, § 844(h) and § 924(c)(1)

—reveals that all of the provisions containing language expressly prohibiting probation were enacted before the Sentencing Reform Act created the Sentencing Guidelines, which became effective November 1, 1987. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102, 84 Stat. 922, 957 (1970) (enacting 18 U.S.C. § 844(h), modeled after Gun Control Act of 1968, Pub. L. 90-618, § 102, 82 Stat. 1213 (1968) which enacted 18 U.S.C. 924(c)(1)(A)-(D)); *see also* Narcotics Penalties and Enforcement Act of 1986, Pub. L. 99-570, § 1002, 100 Stat. 3207 (1986). By compelling contrast, the mandatory minimum sentence provision of § 2252 was enacted at a time when the Sentencing Guidelines were in place and were binding on district courts, as was § 1324(2)(B)(ii). *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21, § 103, 117 Stat. 650, 653 (2003) (increasing penalties and creating mandatory minimum under § 2252); Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 203, 110 Stat. 3009, 3009-566 (1996) (adding mandatory minimum penalty for violations of 8 U.S.C. § 1324). In light of the chronological legislative context (contrasting pre- and post-Sentencing Guidelines legislation), all that can be read into mandatory minimum sentencing provisions that are unaccompanied by extra express language precluding probation is that such extra language was not needed; probation was precluded under the Sentencing Guidelines structure. *See Green*, 105 F.3d at 1324 (9th Cir. 1997) ("Two provisions in the Guidelines themselves clarify that a sentence of probation is impermissible for the crime committed").

Mueller posits that since the Sentencing Guidelines are no longer mandatory and thus no longer restrict the full scope of § 3561, district judges are now free to decide if probation is appropriate for convictions under statutes that contain mandatory minimums but no express language precluding probation. In doing so, Mueller relies heavily on the probation statute

itself and what its drafters might have contemplated in the absence of the Sentencing Guidelines. His reliance is misplaced, however, because he ignores the sentencing provision of the *offense* statute and what its drafters quite clearly contemplated in the presence of the Sentencing Guidelines. There is no question that Congress was aware of and relied upon the Sentencing Guidelines' circumscription of probation authority when enacting the mandatory minimum sentence at issue in this case.

To begin with, Congress is presumed to have acted with awareness of the relevant legal context when it passes legislation. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). In the context of this offense statute, moreover, Congress articulated its specific intent to remove discretion from sentencing judges to depart downward from the minimum sentence. The minimum sentencing provision was first added in 2003 as part of the PROTECT Act, which increased penalties for crimes involving the child pornography industry. *See* PROTECT Act, Pub. L. No. 108-21, § 103, 117 Stat. 650, 653; S. Rep. 108-2, 10 (2003) (Senate Report regarding the PROTECT Act). The Act not only created a mandatory minimum for this offense, but further limited discretion to depart downward from the Guidelines. PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667-8 (amending 18 U.S.C. § 3553). While the wisdom of such a step away from judicial discretion (under a binding or advisory guidelines system) may be debatable, the legislative intent to do so with regard to this offense is not. *See* 149 Cong. Rec. S5113, S5121-22 (Apr. 10, 2003) (remarks of Sen. Hatch on the PROTECT Act) ("the game is over for judges . . . you are not going to go on doing what is happening in our society today on children's crimes, no matter how softhearted you are. That is what we are trying to do here.").[4] Such a deliberate legisla-

[4] It is important to note that although *Booker* directly struck down the PROTECT Act's addition of a *de novo* standard of review for departures

tive action should only be set aside by this court if required under the law. *Booker* does not create such a condition.

C. *Booker* does not require disregard of congressional intent here

As this appeal originates out of the practical impact of the *Booker* decision, it is worth emphasizing that the constitutional issues in that case did not involve mandatory minimum sentences. *See United States v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005) ("*Booker* does not bear on mandatory minimums"). As is familiar by now, in *Booker* the Supreme Court applied its decisions in *Apprendi v. New Jersey*, 530 U. S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), to the Sentencing Guidelines and held that the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing beyond a reasonable doubt. *Booker*, 543 U.S. at 244. Having found a constitutional defect in the Guidelines as enacted, which allowed for sentence enhancements based on facts found by a preponderance of evidence by a judge, the Court evaluated potential remedies and concluded that the one most consistent with congressional intent would be to excise the provision that made the Guidelines mandatory, 18 U.S.C.A. § 3553(b)(1) (Supp. 2004). *Id.* at 244-46.

Although we currently understand and interpret the Sentencing Guidelines as advisory rather than mandatory, that is not the way Congress understood the Sentencing Guidelines at the time it enacted a mandatory minimum sentence—which at that time, precluded probation—for violations of § 2252. Of course, even under the post-*Booker* sentencing regime, district courts must still consult the Sentencing Guidelines and take them into account, *see* 18 U.S.C. § 3553(a)(4); *Booker*, 543 U.S. at 246, so it is not as if the Sentencing Guideline provisions that add explicit limitations on proba-

---

from the Sentencing Guidelines range, *see Booker*, 543 U.S. at 261, that provision is not the aspect of the PROTECT Act under review here.

tion have disappeared. Nor are those provisions constitutionally problematic. *See Booker*, 543 U.S. at 258 ("Most of the statute is perfectly valid.").

The sentencing regime we have now, after *Booker*, is a remedy created by the Supreme Court with the very purpose of giving effect to congressional intent embodied in the interrelated provisions of the complex sentencing structure. *See id.* at 248. Considering the potential remedial approaches, the Court explained, "we must decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute." *Id.* at 247. The Court's task in *Booker* is analogous to our task in this case. Here, our choice in these terms is whether to recognize an "express preclusion of probation" where such a preclusion is already implied and is expressly precluded by the now advisory Sentencing Guidelines, or to effectively eliminate the provision which provides for a mandatory minimum of five years of incarceration. Whereas the *Booker* Court gave effect to congressional intent by choosing the latter of the two approaches, we honor congressional intent in this context by choosing the former.

III. Conclusion

Where we are faced with a clear congressional mandate, as we are here, we can see no justification for using the *Booker* remedy (rendered according to a constitutional holding unrelated to the issue before us) to subordinate a legitimate legislative action to the law of unintended consequences. The district court was correct in interpreting § 2252(b) to require a mandatory minimum of five years incarceration, not to be substituted at the judge's discretion for an individually-tailored sentence that combines probation and a term of incarceration of less than five years. Accordingly, the judgment is affirmed.

AFFIRMED.